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Attorneys for Defendants OCWEN LOAN SERVICING, LLC; DEUTSCHE BANK  
 NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST  
 2006-OPT5, ASSET BACKED CERTIFICATES, SERIES 2006-OPT5, erroneously sued herein  
 as DEUTSCHE BANK NATIONAL TRUST COMPANY; and POWER DEFAULT  
 SERVICES, INC.

**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

REY TABONES AND FELOMENA	)	CASE NO.: 3:13-cv-05225-WHO
TABONES,	)	
	)	HON. WILLIAM H. ORRICK
Plaintiffs,	)	
vs.	)	<b>REPLY TO PLAINTIFFS' OPPOSITION</b>
	)	<b>TO DEFENDANTS' MOTION TO</b>
DEUTSCHE BANK NATIONAL TRUST	)	<b>DISMISS</b>
COMPANY; OCWEN LOAN SERVICING,	)	
LLC; POWER DEFAULT SERVICES, INC.;	)	Date: March 5, 2014
and DOES 1-100, INCLUSIVE;	)	Time: 2:00 p.m.
	)	Ctrm: 2, 17 <sup>th</sup> Floor
Defendants	)	
	)	
	)	
	)	

**I. INTRODUCTION**

Defendants submit the following Reply to Plaintiffs' Opposition filed on December 24, 2013. Plaintiffs' Opposition maintains this is a wrongful foreclosure action based on Defendants lacking of any right under the loan. (Opp. Intro. p. 1). Plaintiffs' Opposition ignores much of the controlling authorities cited in the Motion to Dismiss. The authority they cite is misplaced and insufficient to circumvent the controlling law.

Plaintiffs suggest this action is not judicially estopped by their Bankruptcy because the

1 Bankruptcy Court did not rely on the information they provided in their Schedules under penalty  
2 of perjury to obtain the Bankruptcy relief, or that subsequent separate actions asserting positions  
3 inconsistent to that of the Bankruptcy are not estopped. Plaintiffs are incorrect on both counts as  
4 a matter of law under the authorities in the Motion which go unaddressed in the Opposition.

5 Plaintiffs are judicially estopped and this action must be dismissed. Even they were not  
6 estopped in this action, Plaintiffs' do not circumvent the Motion establishing that the claims fail.

7  
8 First, Plaintiffs' focus primarily on the state court opinion Glaski for the proposition that  
9 they are a third-party beneficiary of the trust agreement and PSA by and between other parties.  
10 However Glaski is neither the law in this Country nor is binding on this Court. **Eight** federal  
11 district courts have disagreed with and declined to follow the state court option in Glaski,  
12 including **six** Courts in this Northern District. As established by the numerous unaddressed  
13 authorities in the Motion, Plaintiffs do not have standing and cannot base their claims upon a  
14 challenge to the initial loan trust agreement or PSA between other parties or Defendants. The  
15 Complaint based on this theory must be dismissed.

16  
17 Second, Plaintiffs cite no controlling authority on point to circumvent the law  
18 establishing that their TILA claim is time-barred and that the Court thereby lacks subject matter  
19 jurisdiction. Even if the Court had jurisdiction, the Complaint fails to allege the necessary  
20 elements such as that any non-disclosure by the originator of the loan was apparent on the face  
21 of the Note, Deed of Trust, or disclosure statement. Implication or suggestion as argued in the  
22 Opposition is insufficient. Plaintiffs' TILA claim must be dismissed.

23  
24 Third, Plaintiffs' FDCPA claim necessarily fails under the creditor exemption to the  
25 definition of a "debt collector," and because foreclosure is excepted from the purview of debt  
26 collection. The Complaint is based on the recorded foreclosure notices, not telephone calls or  
27 letters outside or prior to foreclosure. Again, Plaintiffs' premise that the un-delineated  
28 Defendants violated the FDCPA due to the PSA cannot be stated.

Fourth, Plaintiffs' RESPA claim similarly fails on the elements. No claim can be stated against Deutsche or PDS and insufficient against Ocwen limited to the servicing of the loan. Once more, Plaintiffs' theories about the loan origination and transfer pursuant to a trust and PSA agreement cannot serve as a basis for the claim. Payments made by Plaintiffs on their defaulted loan are not damages and the Complaint alleges no completed foreclosure. The RESPA claim must be dismissed. There is no remaining or applicable basis for the common count of money had and received. Defendants' Motion should be granted with prejudice.

**II. PLAINTIFFS ARE JUDICIALLY ESTOPPED IN THIS ACTION AS A RESULT OF THEIR BANKRUPTCY**

Plaintiffs do not address much of the authorities set forth in the Motion. Plaintiffs take the position in their Opposition (1) that only inconsistent positions taken in the same litigation are judicially estopped; or (2) that the Bankruptcy Court in granting the relief did not rely on the Plaintiffs' failure to schedule or disclose any of their claims concerning the loan as alleged in this action. As established by the multiple authorities in the Motion which go unaddressed in the Opposition, Plaintiffs are wrong on both counts.

First, the doctrine of judicial estoppel bars subsequent actions in another court, as established by authorities in the Motion unaddressed by Plaintiffs. Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 600-601 (9<sup>th</sup> Cir. 1996); Conrad v. Bank of America Nat'l. Trust & Sav. Ass'n. (1996) 45 Cal.App.4<sup>th</sup> 133, 146-47. Plaintiffs do not address these cited authorities. Plaintiffs' suggestion of a settled claim being a distinguishing characteristic under the separate Hay decision is of no course. Even if it were, Plaintiffs' stipulation to amend their Chapter 13 Plan to provide the loan payment amounts to Defendants in full and agreement to be bound thereby would in effect be deemed a settlement or resolution of Defendants claim under the loan in its entirety. (RJN Exhs. 4, 7-10).

Second, Plaintiffs are judicially estopped due to the inconsistent position now taken

challenging their loan as to the identified creditor Defendants. Plaintiffs scheduled the loan to creditor Defendants without dispute or set off in order to set their liabilities in excess of assets. (RJN Exhs. 4-10). Plaintiffs' creditors and the Bankruptcy Court relief upon this information enabling Plaintiffs to obtain the Bankruptcy relief received, i.e. confirmed Chapter 13 Plan for payments to Defendants and Plaintiffs' other creditors. (RJN Exhs. 8-10). The Complaint does not and cannot suggest otherwise. As a result, Plaintiffs are prevented from maintaining this action. See, Hamilton v. State Farm Fire & Casualty Company 270 F.3d 778, 783 (9<sup>th</sup> Cir. 2001); Conrad at 146; Oneida Motor Freight, Inc. v. United Jersey Bank. 848 F. 2d 414, 417 (3<sup>rd</sup> Cir. 1988). Defendants' Motion should be granted and this action dismissed.

### **III. PLAINTIFFS HAVE NO STANDING TO VOID THE ASSIGNMENT TO DEFENDANT UNDER A PSA UNDER THE APPLICABLE LAW**

Plaintiffs' Complaint does not and cannot allege they were signatories or parties to the PSA or the Assignment of the beneficiary interest in the loan by and between other parties. Nevertheless, Plaintiffs argue they have standing to challenge the Assignment of the loan under the PSA in New York as intended third-party beneficiaries, citing to the California state opinion in Glaski v. Bank of America, 218 Cal.App.4<sup>th</sup> 1079 (Cal.App. 5 Dist. 2013).

As reported however, **two** Federal Courts in this District have disagreed with Glaski. See, Apostol v. Citimortgage, Inc., 2013 WL 6328256 \* 6-7 (N.D.Cal. Nov. 21, 2013); In re Sandri, 501 B.R. 369 (Bankr.N.D.Cal. Nov. 4, 2013). The Northern District Court disagreed with the minority opinion attempting to interpret New York trust law in Glaski;

Plaintiff relies on Glaski v. Bank of Am., Nat'l Ass'n, 218 Cal.App. 4th 1079, 1097 (2013). In Glaski, the California Court of Appeal held that allegations that the transfer of the DOT to a securitized trust post the closing date required by PSA, were sufficient to allege a claim that the attempted transfers of the DOT were void. Id. at 1097-98. However, Glaski represents a distinct minority view on the standing of third parties to enforce or assert claims based on alleged violations of a PSA. Indeed, other California Court of Appeal decisions have found to the contrary. For example, the Court of Appeal in Jenkins v. JP Morgan Chase Bank, N.A., 216 Cal.App. 4th 497, 515 (2013) rejected a plaintiff's attempt to rely on alleged

deficiencies in the securitization process to challenge subsequent assignments of the promissory note. The Court held that “[a]s an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions.” Even assuming that the subsequent transfers of the note were invalid, the Court nonetheless concluded that plaintiff “is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an entity or individual who believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of their interest in the note.” *Id.*

Moreover, courts in this District have expressly rejected *Glaski* and adhered to the majority view that individuals who are not parties to a PSA cannot base wrongful foreclosure claims on alleged deficiencies in the PSA/securitization process. *See, e.g., Dahnken v. Wells Fargo Bank, N.A.*, C 13–2838 PJH, 2013 WL 5979356, \*2 (N.D.Cal. Nov. 8, 2013) (“[t]he court adopts the ‘majority position’ of courts within this district, which is that ‘plaintiffs lack standing to challenge noncompliance with a PSA in securitization unless they are parties to the PSA or third party beneficiaries of the PSA.’”); *In re Sandri*, 2013 WL 5925655 (Bankr.N.D.Cal. Nov. 4, 2013) (“The court disagrees, as *Glaski* is inconsistent with the majority line of cases and is based on a questionable analysis of New York trust law.”).

*Apostol v. CitiMortgage, Inc.*, 2013 WL 6328256 \* 6-7 (N.D.Cal. Nov. 21, 2013 (No. 13-CV-01983-WH)).

Additionally, **six** Federal Courts have declined to follow *Glaski*, including **four** Courts in this District. *See, Subramani v. Wells Fargo Bank N.A.*, 2013 WL 5913789 (N.D.Cal. Oct. 31, 2013); *Dahnken v. Wells Fargo Bank, N.A.*, 2013 WL 5979356 (N.D.Cal. Nov. 8, 2013); *Zapata v. Wells Fargo Bank, N.A.*, 2013 WL 6491377 (N.D.Cal. Dec. 10, 2013); *Rivac v. Ndex West LLC*, 2013 WL 6662762 (N.D.Cal. Dec. 17, 2013); *Newman v. Bank of New York Mellon*, 2013 WL 5603316 (E.D.Cal. Oct. 11, 2013); *Boza v. U.S. Bank Nat. Ass’n*, 2013 WL 5943160 (C.D.Cal. Oct. 28, 2013). The minority *Glaski* opinion is not mandatory authority in this Court.<sup>1</sup>

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<sup>1</sup> Plaintiffs’ reference to *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1<sup>st</sup> Cir. 2013) is inapposite. The Court in *Culhane* in applying Massachusetts law upheld summary judgment in favor of the loan servicer in an action including a claim that the borrower had recognized standing to challenge the assignment of the loan. The Court noted that while the borrower had standing to challenge a loan assignment to a particular assignee where the assignor had nothing to assign (e.g. MERS nominee argument), the Court also noted that a borrower does not have standing to challenge shortcomings in an assignment that render it merely voidable at

Accordingly, Plaintiffs' Complaint cannot challenge the recorded Assignment of the loan to Deutsche as void or voidable under the PSA. (Cplt. Exh. C). In that this is the premise of Plaintiffs' Complaint, Plaintiffs' argument against application of the **tender rule** based thereon fails in this self proclaimed wrongful foreclosure action. As a further result of the failed premise, Defendants' Motion should be granted pursuant to the weight of authority.

**IV. THE FIRST CLAIM UNDER TILA REMAINS INAPPLICABLE TO DEFENDANTS AND TIME-BARRED AS A MATTER OF LAW**

Defendants' Motion does not request to make factual findings or resort to extraneous documents not properly before the court. The only documents relied upon in the Motion or those exhibited to Plaintiffs' Complaint and public records filed by them with the U.S. Bankruptcy Court in their Bankruptcy. Plaintiffs' Opposition does not and cannot lodge a specific objection to these records exhibited and filed by them. Rather, Plaintiffs are grasping at straws for a TILA claim that is barred against each of these Defendants.

As established above, Plaintiffs' claims challenging how or when the 2006 loan was securitized into a trust pool cannot be stated. As established in the Motion, Plaintiffs' TILA claim is time-barred and the Court lacks subject matter jurisdiction. 15 U.S.C. §§ 1635(f), 1640(e); King v. Cal. 784 F.2d 910, 913-14 (9th Cir. 1986); Hubbard v. Fidelity Federal Bank, 824 F.Supp. 909 (C.D.Cal. 1993). The time periods in TILA are substantive and absolute, there is no equitable tolling in the context of this action as suggested by Plaintiffs. See, Walker v. Washington Mut. Bank FA, 63 Fed.Appx. 316, 317 (9<sup>th</sup> Cir. 2003) (slip opinion); Rowland v. Novus Financial Corp., 949 F.Supp. 1447, 1454 (D.Haw. 1996). Miguel v. Country Funding,

the election of one party. Id. at 291. Here, Plaintiffs' Complaint asserts no claim challenging a MERS nomination or assignment. The Culhane decision is distinguishable, inapplicable, or not controlling in this action pending in this Circuit. In any event, the Court in that decision upheld summary judgment in favor of the loan servicer and against the borrower.

309 F.3d 1161, 1164 (9<sup>th</sup> Cir. 2002) (the limitations periods under TILA, such as three years for rescission actions under Section 1635(f), are absolute and bar any claims thereafter).

Plaintiffs' Opposition does not address these statutory provisions and authorities, and cites no controlling authority to circumvent them.<sup>2</sup> Plaintiffs cite no authority regarding the inapplicability of Section 1641(g) amendment made effective in 2011 and which was not effective at the time of the 2008 assignment. The first claim must be dismissed with prejudice.

Even if Plaintiffs' TILA claim was not barred and this Court still had jurisdiction, no TILA claim can be stated against Ocwen as the loan servicer or PDS as the foreclosure trustee. TILA excepts loan servicers and are not made applicable to foreclosure trustees as acknowledged. 15 U.S.C. § 1641(f); (Cplt. ¶ 24). Further, the Complaint does not state the TILA claim against assignee Deutsche. The Complaint does not allege that a TILA violation was apparent to Deutsche on the face of the Note, Deed of Trust, or Disclosure Statement. 15 U.S.C. §§ 1640, 1641(a),(e); Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7<sup>th</sup> Cir. 1998); Ramadan v. Chase Manhattan Corp., 229 F.3d 194 (3<sup>rd</sup> Cir. 2000); Balderos v. City of Chevrolet, 214 F.3d 849 (7<sup>th</sup> Cir. 2000); Smith v. Highland Bank, 915 F.Supp. 281 (N.D.Ala. 1996); Barber v. Fairbanks Capital Corp., 266 B.R. 309, 321 (Bkcty.E.D.Cal. 2001).<sup>3</sup> These are the sole documents considered pursuant to these authorities, not some amorphous loan file or set of

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<sup>2</sup> Plaintiffs' reference to King for some unspecified equitable tolling is entirely misplaced. The Court in King made clear that equitable tolling is not available in the context of this action, only as a defense for set-off or recoupment in an action filed against a borrower by the lender/servicer to foreclose or other claim. This action was not filed by Defendants. No doubt, this is the reason why Plaintiffs do not discuss or develop their suggestion under King.

<sup>3</sup> The statutory phrase, "apparent on the face of the disclosure statement" is strictly applied. It does not include misrepresentations, special knowledge, or other documents in connection with the issuance of the loan; there is no additional duty of inquiry by assignees. See, e.g., Taylor v. Quality Hyundai, Inc., 150 F.3d 689 (7<sup>th</sup> Cir. 1998); Ramadan v. Chase Manhattan Corp., 229 F.3d 194 (3<sup>rd</sup> Cir. 2000); Balderos v. City of Chevrolet, 214 F.3d 849 (7<sup>th</sup> Cir. 2000); Smith v. Highland Bank, 915 F.Supp. 281 (N.D.Ala. 1996) (assignee not liable because alleged finance charge was not apparent on the face of the TILA disclosure or HUD-1 settlement statement).



documents that may come later with the assigned file if at all. Plaintiffs cite no cognizable authority otherwise. Plaintiffs' first claim under TILA must be dismissed with prejudice.

**V. THE OPPOSITION DOES NOT RESURRECT THE FAILED FDCPA CLAIM**

Defendants do not maintain that they can never fall within the FDCPA definition of a "debt collector" in any scenario. In the instant scenario as alleged by the Complaint however, Defendants are not debt collectors under the FDCPA.

Despite Plaintiffs' argument at page 9 of the Opposition, the Complaint does not allege "letters requesting payment" from each Defendant. Rather, Plaintiffs' FDCPA claim is based on (1) the failed premise that Defendants cannot enforce or collect upon the defaulted loan due to untimely securitization and assignment under a PSA (Cplt. ¶ 34); and (2) an alleged failure of Defendants regarding mitigation attempts prior to the Notice of Default pursuant to California Civil Code § 2923.5. (Cplt. ¶ 35-39, Exh. E). If the Complaint alleges that "Defendants" did not make certain attempts or communications, then it cannot be said that Defendants make improper attempts or communications to affirmatively collect a debt. The FDCPA claim is premised more upon the recorded Notice of Default commencing the foreclosure. (Cplt. ¶¶ 36, 37, 39).

Despite Plaintiffs' argument, the law under the FDCPA provides that Defendants cannot be liable under the exemptions for creditors collecting their own debts. See, Scott v. Wells Fargo Home Mortg., 326 F.Supp.2d 709, 718 (2003), McAnaney v. Astoria Financial Corp Scott v. Wells Fargo Home Mortg., 357 F.Supp.2d 578, 592-593 (E.D.N.Y. 2005); Showalter v. Chase Manhattan/Providian, 2005 WL 2000943 (N.D.Cal. Aug. 19, 2005) (creditor exemption proper on motion to dismiss). Also, Defendants cannot be liable under the FDCPA for the non-judicial foreclosure process. See, Hulse v. Ocwen Federal Bank, FSB, 195 F.Supp.2d 1188, 1204 (D.Or., 2002) (foreclosure of an interest in property is not the collection of money under FDCPA); Williams v. Countrywide Home Loans, Inc., 504 F.Supp.2d 176, 190 (S.D.Tex.2007); Ines v.



Countrywide Home Loans, Inc., 2008 WL 2795875 (S.D.Cal. 2008); Gallegos v. Recontrust Co., 2009 WL 215406 \* 3 (S.D.Cal. August 4, 2009).

Plaintiffs do not address these authorities cited for the creditor and foreclosure exemptions. Further, the Complaint alleges no debt collection specifically by Deutsche or PDS, or by Ocwen for that matter. Plaintiffs' second claim under the FDCPA must be dismissed.

#### **VI. PLAINTIFFS' RESPA CLAIM STILL FAILS**

Plaintiffs do not address Defendants' authorities. Plaintiffs ignore the failure of their allegation of a QWR to Deutsche and PDS. (Cplt. ¶ 46). 12 U.S.C. §§ 2605(e)(1)(A), (e)(1)(B); Judd v. Resolution Trust Corp., 1999 WL 1014964 (D.D.C. Aug. 17, 1999) (servicers only). No RESPA claim can be stated against them. Plaintiffs do not cite controlling authority to circumvent the rule that as to Ocwen RESPA is not triggered if there is no qualified written request addressing issues other than loan servicing, e.g. the origination, securitization, or validity of the loan. 12 U.S.C. § 2605(i)(3); Consumer Solutions REO, LLC v. Hillery, 658 F.Supp.2d 1002 (N.D.Cal. 2009) (RESPA 12 U.S.C. § 2605(e) governs QWR's to servicers, not owners of the loan); MorEquity, Inc. v Naeem, 118 F.Supp.2d 885 (N.D.Ill. 2000); Pettie v. Saxon Mortgage Services, 2009 WL 1325947 (W.D.Wash., 2009).

Plaintiffs do not allege dates or specifics. Plaintiffs concede that Ocwen provided a timely response "within 60 days" on June 4, 2013 and validated the defaulted loan account as correct with a power of sale. (Cplt. ¶¶ 48, 49). That Plaintiffs disagree does not establish a claim under RESPA. Once again, Plaintiffs' premise that Defendants do not have authority pursuant to a PSA fails. That Plaintiff made payments under the loan to Defendants as required does not establish damages either. 12 U.S.C. § 2605(f)(1); Byrd v. Homecomings Financial Network, 407 F.Supp.2d 937 (N.D.Ill. 2005). If Plaintiffs truly believed Defendants had no authority under the loan, they would not have done so. The Complaint does not name or allege any other party that purportedly has the loan. The third claim should be dismissed.

**VII. THERE IS NO CLAIM FOR MONEY HAD AND RECEIVED**

There is no remaining basis for Plaintiffs' last claim for money had and received. The fatal flaw is that it is Plaintiffs that owes the debt to repay his loan. Defendants do not owe the money on the debt to Plaintiffs. This is especially the case since Plaintiffs are under order of the U.S. Bankruptcy Court to make payments to Defendants pursuant to the confirmed Chapter 13 Plan in Plaintiff's Bankruptcy. (RJN Exh. 4, 7-10). The Complaint does not specify "damages" vaguely alleged on information and belief. (Cplt. ¶ 64). A cursory claim of damages is not a money debt owed by un-delineated Defendants to Plaintiffs. As established, Plaintiffs lack standing and their premise of a void or voidable loan under a PSA trust transfer, upon which this and the other claims are based, fails. Plaintiffs cite no law in their Opposition establishing a money had and received claim. Plaintiffs' fourth claim for money had and received cannot be stated. See, Schultz v. Harney (1994) 27 Cal.App.4<sup>th</sup> 1611, 1623, 33 Cal.Rptr.2d 276; Weiss v. Marcus (1975) 51 Cal.App.3d 590, 599, 124 Cal.Rptr. 297.

**VIII. CONCLUSION**

For the reasons set forth in the Motion and above, Defendants respectfully request their Motion be GRANTED and that they be dismissed from this action with prejudice.

DATED: December 30, 2013

HOUSER & ALLISON  
A Professional Corporation

/s/ Jeffrey S. Allison  
Jeffrey S. Allison, Esq.  
Attorneys for Defendants OCWEN LOAN  
SERVICING, LLC; DEUTSCHE BANK  
NATIONAL TRUST COMPANY, AS  
TRUSTEE FOR SOUNDVIEW HOME  
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SERVICES, INC.

**PROOF OF SERVICE**

STATE OF CALIFORNIA )  
 ) SS  
COUNTY OF ORANGE )

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 9970 Research Drive, Irvine, California 92618.

On December 30, 2013, I served the following document(s) described as follows:

**REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

On the following interested parties in this action:

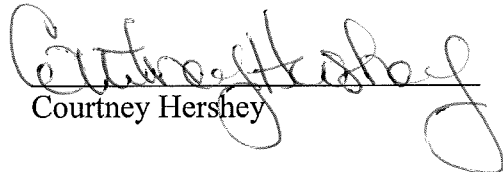
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☒ VIA ELECTRONIC MAIL—I transmitted the document(s) listed above electronically either by e-mail or by electronic filing through the CM/ECF System to the e-mail addresses listed above. I am readily familiar with Microsoft Outlook's e-mail system and the United States District Court's CM/ECF System, and the transmission was reported as complete without error.

I declare under penalty of perjury, under the laws of the United States that the foregoing is true and correct.

Executed on December 30, 2013 at Irvine, California.

  
Courtney Hershey